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Statutory Instruments and Legislative Effect: the Case of Botswana

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TABLE OF CONTENTS

Introduction

Legislatures have limited control over legislation they have enacted once they delegate powers to make subsidiary legislation.[1] In the context of Botswana, subsidiary legislation is defined by section 49 of the Interpretation Act as having the same meaning as statutory instruments. What this means then is that if safeguards are not put in place to ensure that statutory instruments are laid before the National Assembly, the legislature has no means to supervise or control subsidiary legislation. It is worth noting, however, that a number of expressions are used worldwide as synonyms of the term subsidiary legislation. 'Subordinate legislation', 'delegated legislation', 'secondary legislation' and 'statutory instruments' are all often used as synonyms. As Greenberg explains, the real synonym for subordinate legislation is delegated legislation since it is the delegation of power by primary legislation that gives authority to legislation subordinate to it. The term statutory instrument, Greenberg further explains, describes only a sub-class of subordinate legislation.[2]

It must be noted further that the term statutory instrument does not describe a kind of legislation, but a particular method by which different kinds of secondary legislation can be made.[3] Legislation conferring power to make secondary legislation often provides for the power to be exercised by a statutory instrument and such secondary legislation may be made by order, regulations, rules or byelaws with the order, regulations, rules or byelaws being the kind or type of instrument chosen by primary legislation. But where an order, for example, is entirely

[1] Duncan Berry, 'When does an instrument made under primary legislation have "legislative effect"?' First published in *The Loophole* in March 1997. Based on a paper presented at the CALC conference held in Vancouver, September 1996.
[2] Daniel Greenberg, *Craies on Legislation* (8th edn, Sweet & Maxwell 2004) 8.
[3] ibid 103.

administrative in nature, the legislation may say nothing about the form of the order, in which case it will not be a statutory instrument.[4]

It suffices to note that statutory instruments are the most common method by which delegated or secondary legislation is made in Botswana. In the year 2014, 28 Acts of Parliament were passed into law and at least 115 statutory instruments were made in that year. This means that on average, with one Act comes at least four statutory instruments. For a country with a population of just over two million people[5], this is quite a big number and this shows the significance of statutory instruments in legislation in Botswana.

Statutory instruments in Botswana are regulated by the Statutory Instruments Act[6]. The Act defines what statutory instruments are and provides for procedures that are to be followed when making the instruments including the requirement for these to be published in the gazette and to be laid before the National Assembly. Secondary or delegated legislation would therefore, in the case of Botswana, generally mean instruments made directly or indirectly under an Act of Parliament. Statutory instruments are, however, given a more specific and narrow definition by the Statutory Instruments Act. These are defined by the Act as instruments made directly or indirectly under an Act and having legislative effect.[7] They include regulations, rules, orders, declarations, bye-laws and proclamations. The narrowing phrase here is 'having legislative effect'.

[4] Greenberg (n 2) 104.
[5] Population and Housing Census 2011, National Statistics Tables 2015, published by Statistics Botswana, page 3 table 1 shows a total population of 2 024 904 in the year 2011, ISBN 978-99968-429-2-4.
[6] Laws of Botswana, Chapter 01:05.
[7] This definition is derived from section 2 of the Statutory Instruments Act which defines a statutory instrument as any instrument made directly or indirectly under an Act and having legislative effect.

As shall be noted later in the thesis, there may be other instruments made under an Act of Parliament that do not fall squarely within the definition in section 2. Codes of conduct, other rules, orders and guidelines, although made under an Act of Parliament, are not considered statutory instruments within the meaning of section 2 of the Statutory Instruments Act. They are therefore are not subject to the requirements under the Statutory Instruments Act. This is because in most cases the Act confers a specific power to make a statutory instrument. But where the wording or language in the enabling provision does not specifically provide for the power to be exercised by a statutory instrument, the rules or orders made pursuant to that provision will be considered administrative and not legislative. Examples are the Public Service General Orders, Law Society Code of Conduct etc.

It is interesting to note that although these orders, especially the Public Service General Orders, contain substantive issues and would, if carefully construed, be found to have legislative effect and thus qualify to be statutory instruments within the meaning of section 2. But because of the nomenclature used in the Act or the type of instrument chosen by the enabling legislation, they end up falling outside the ambit of the Statutory Instruments Act while in actual fact they should. The issue of whether or not an instrument has legislative effect is therefore not an academic one but one that reflects on what really happens in practice.[8]

An important factor to note is that when courts interpret statutes to ascertain what the intention of parliament was, they are guided by words used in the Act. It is words like *notice, regulation* or *order* that will assist the court ascertain whether or not the legislature intended to delegate a legislative power. That is, in determining whether the power delegated is legislative or administrative, the court will most likely restrict its opinion to the definition in section 2 of the

[8] Berry (n 1) 1.

Statutory Instruments Act. Another important factor to note is that even where the court finds that the instrument does provide for more than what may be considered an administrative matter, it will not substitute its own interpretation for what is in the statute but simply state its opinion. This means that the instrument remains a *notice* and outside the ambit of the Statutory Instruments Act. As a result, the content of the law will still not form part of the statute book and be lost in an administrative instrument. This raises an issue of accessibility of legislation and its legislative content.

A drafter's main concern must therefore be on what goes into the statute book and care must be taken to ensure that instruments with legislative effect are indeed contained in the statute book. As principal custodians of the rule of law[9], it is important that drafters draft enabling provisions with due care and diligence ensuring that the correct wording and type of instrument is used when crafting empowering or enabling provisions. Choosing the correct wording and type of instrument goes to the root of what is and what is not laid before the National Assembly.

This dissertation therefore hypothesizes that in order to enhance parliamentary scrutiny and contribute towards effectiveness in delegated legislation, drafters need to know whether or not an instrument made pursuant to an Act will have legislative effect when drafting enabling or empowering clauses. To do so, they need to know the type of effect the instrument will have on legislation. If the effect is legislative then the instrument should be a statutory instrument. This can be achieved by clearly defining what 'legislative effect' means and ensuring consistency in deciding what should be deemed to have legislative effect. Making drafters aware of what to look out for and having guidelines that enable them choose the correct type of delegated power,

[9] Ann Seidman, Robert B. Seidman and Nalin Abeyesekere, *Legislative Drafting for Democratic Social Change: A Manual for Legislative Drafters* (Kluwer Law International 2001) 207.

particularly the type of instrument to be used when exercising law making powers, would enhance parliamentary scrutiny by ensuring that the executive accounts to the legislature when it should and contribute towards effectiveness in delegated legislation.

The dissertation will attempt, by use of examples from the laws of Botswana and case law, to show how inconsistencies in choosing the type or form of instrument impacts on parliamentary scrutiny. The first chapter gives an overview of the making of statutory instruments in Botswana, focusing mainly on delegated legislative powers, empowering provisions in principal legislation and what can and what cannot be delegated. The chapter further discusses the requirements under the Statutory Instruments Act. The second chapter discusses the meaning of legislative effect, attempts to answer the question when does an instrument has legislative effect and illustrates by use of examples the meaning of legislative effect. The third and last chapter analyse the first two chapters by identifying gaps in the Act and making recommendations on how these gaps can be filled to enhance parliamentary scrutiny and improve effectiveness. Recommendations are based on what other commonwealth jurisdictions have done to address the issue.

Chapter 1

1.1 An overview of statutory instruments in Botswana

The power to make statutory instruments is delegated to specified authorities or agencies by parliament. It is an established rule that delegation of legislative power should not extend to matters of principle, as only persons directly responsible to the electorate should exercise supreme legislative authority. This is because a critical issue in the delegation of legislative power, as Xanthaki notes, is the degree of accountability of the delegate to the legislature.[10] As matters of high policy are a reserve of the legislature, it is only logical following the constitution that they are left to be debated and determined by the National Assembly after public debate and after publication in Bill form.

This is a platform put in place by the constitution so that any citizen or member of civil society can have his or her say through their representative in Parliament. This also enables and enhances informed comment on the Bill by the media or press.[11] Therefore, as a general rule, in a consideration of the propriety of a proposed delegation of legislative power, legislative power should be delegated beneath ministerial level only in exceptional cases where adequate control is exercised by other means or the power is limited to administrative or procedural matters of little substance. Hence the delegation of legislative power is in most cases to the Minister. The different forms of delegated legislation in Botswana reflect an application of this principle.

In Botswana, delegated legislation may be made by the Minister in the form of rules and regulations which supplement an Act of Parliament and this is the form of delegation that is mainly used in the different Acts of Parliament. An example is section 32 of the Waterworks

[10] Helen Xanthaki, *Thornton's Legislative Drafting* (5th edn Bloomsbury Professional 2013) 405.
[11] *Minister of Labour & Home Affairs and the Attorney General v Botswana Employees Union and Others*, Court of Appeal Civil Case No. CACGB-083-12 (unreported) paragraph 106.

Act[12] which provides that the Minister may, by statutory instrument, make regulations for the more effective carrying out of the provisions of the Act. In some cases the Act provides for a more specific power. An example is section 56 of the Sectional Titles Act[13] which provides that,

> The Minister may by statutory instrument make -
>
> (a) rules providing for any matter which under this Act is to be provided for by rules or which otherwise relates to the control, management, administration, use and enjoyment of the sections and the common property of a scheme; and
>
> (b) regulations providing for any matter which under this Act is to be provided for by regulations or is to be prescribed or which may be necessary or expedient for giving effect to the provisions of this Act.

Other forms in this category include orders and declarations. An example can be found in section 4 of the Waterworks Act which provides that the Minister may, by statutory instrument, declare any area in which an undertaking exists or in which he considers that a public water supply should be established to be a waterworks area for the purposes of the Act and shall define the boundaries of such area. Where the Act provides that the Minister may declare something or appoint a day for something to done, and specifically provides for that act or thing to be done by a statutory instrument, this is generally construed to mean that the appointment should be done by an *order*. *Order* being the type of instrument used. An example is commencement orders, where the Minister, by *order*, appoints a day on which an Act shall come into force or declares that the Act shall come into operation on a specified day.

In relation to delegation beneath ministerial level, delegated legislation may be made by local authorities in the form of byelaws to regulate their locality according to their particular localized needs. These are however made subject to the Minister's consent or approval. There are two

[12] Laws of Botswana, Chapter 34:03.
[13] ibid Chapter 33:04.

ways in which this could be done. The power may be vested in the Minister but exercisable on the advice of the public body or the power may be vested in the public body but subject to consent by the Minister. An example is in section 89 (1) of the Civil Aviation Act[14] which provides that the Minister may, on the recommendation of the Authority, make regulations for the better carrying out of the provisions of the Act and may impose penalties for breach by any person of any such regulations. An example of the delegation power vested in a public body but subject to consent or approval by the Minister is that provided for in section 45 of the Local Government Act[15]. The section provides that,

> (1) All bye-laws made by a Council shall be submitted to the Minister for his or her approval, and no bye-laws shall be of any force or effect until the Minister has approved and caused them to be published in the Gazette.
>
> (2) In approving any bye-law which prescribes service and user fees for the services set out in Schedule 3, the Minister shall act in consultation with the relevant Ministry.

However, an example in section 28 of the Botswana Power Corporation Act[16] shows a different form of delegation below ministerial level although this is a form of delegation that is in a way similar to what is discussed in the type above. The section provides that the Corporation may make bye-laws for any purpose connected with its powers, functions and duties under the Act and may impose penalties for breach of any such bye-laws and the section goes no further. With regards to adequate control, note that this is addressed in another Act. As a statutory corporation the Corporation falls under the supervision of a Minister. This is because section 20 of the Public Authorities (Functions) Act[17] places every statutory corporation and any limited company in which the Government has the majority of shares, under the control of a Minister. Thus, although

[14] Laws of Botswana, Chapter 71.01.
[15] ibid Chapter 40:01.
[16] ibid Chapter 74:01.
[17] ibid Chapter 02:11.

section 28 of the Botswana Power Corporation Act does not specifically state that the Minister should approve or consent to the byelaws, this is already covered by section 20 of the Public Authorities (Functions) Act. The consent or approval of the byelaws would in this case, have been obtained within administrative structure of the Corporation.

The practical effect of these different forms of delegation where one requires consent of and the other recommends to the Minister is the same. They are all safeguards meant to ensure control by the Minister.[18] Other forms of delegated legislation below ministerial level may be in the form codes of practice, circulars and guidance made by government departments but these are usually not considered to be statutory instruments unless it is specifically stated in the enabling legislation.

That notwithstanding, Judges also make delegated legislation in the form of rules of court. However, these are not subject to the Minister's consent or approval. With regard to the making of the High Court rules, the Chief Justice is given power to make rules that can affect all aspects of the management of the High Court Act, and for the better carrying out of the purposes of the Act by section 28 of the High Court Act[19]. The Chief Justice is also empowered by section 67 of the Magistrates Courts Act[20] to make magistrates court rules. The same powers are given to the President of the Court of Appeal under section 16 of Court of Appeal Act[21] and the section provides that the President of the Court of Appeal may make rules of court regulating the practice and procedure of the Court of Appeal.

[18] Xanthaki (n 10) 405.
[19] Laws of Botswana, Chapter 04:02.
[20] ibid Chapter 04:04.
[21] ibid Chapter 04:01.

The powers given to the Chief Justice and the President of the Court of Appeal are similar to or the same as those given to Ministers over the Acts of Parliament they administer. This is proper because the Chief Justice and the President of the Court of Appeal preside over the Judiciary, which is one of the three arms of Government.[22] Furthermore, court rules are designed mainly to allow the court to regulate its own procedure and manage how legal proceedings are brought to the courts. Allowing the legislature to exercise its residual powers through scrutiny over the internal affairs of the judiciary would go against constitutional law and infringe on separation of powers as this could technically mean that the legislature could disallow rules set by the courts for its own processes by annulling the instruments making such rules. Hence, the exclusion of the rules of court from the requirements under section 9 of the Statutory Instruments Acts to be laid before the National Assembly.

It must be noted that powers to make delegated legislation are in some cases given to the President. An example can be found in section 11 of the Deeds Registry Act[23] where the President is empowered to make regulations prescribing, among other things, fees to be charged by the Deeds Registry office, the manner in which deeds or other related documents are to be lodged, registered or filed by the Deeds Registry office and prescribing the fees and charges for conveyancers. The same form of delegation is also found in section 65 of the Public Service Act[24] which empowers the President to make regulations for better carrying out of the purposes and provisions of the Public Service Act. There are other Acts which also empower the President to make regulations or declarations by means of an order and these include section 91 (2) of the

[22] Attorney General's Chambers Botswana, Legislative Drafting Manual 151.
[23] Laws of Botswana, Chapter 33:02.
[24] ibid Chapter 26:01.

Wildlife Conservation and National Parks Act[25] and section 41 (3) of the Immigration Act. The subject matters where this has been done differ and this depends entirely on policy and what parliament considers will be best delegated given the circumstances and policy goals. Unlike the rules of court, these are subject to section 9 of the Statutory Instruments Act and must therefore be laid before the National Assembly.

In other cases, the legislative power is delegated by parliament to the President and the Minister to amend schedules in the Act which usually contain secondary material and sometimes regulations as in the case of the Pensions Act[26]. This is because schedules may lend themselves to frequent amendment without affecting the principles set out in the body of the Act. So in that residual sense schedules are subordinate to the main body of the Act although their legal effect when there is no conflict is no different.[27] Schedules to Acts of Parliament almost invariably contain material which form an adjunct to the Act and do not fit in as substantive clauses.

An example is section 91 of the Wildlife Conservation and National Parks Act[28] which gives a specific form of delegation and stating clearly the conditions under which the amendments may be made. The section provides that,

> (1) In order to enable Botswana to give full effect to the terms of CITES and to Resolutions of the Conferences of the Parties, as they may from time to time be amended, the Minister may by *order* published in the Gazette amend the Fifth Schedule and the list of animals contained in the Appendices to the Convention.
>
> (2) Where the President has, by *order* published in the Gazette declared any area of land to be a national park, a game reserve or sanctuary or a wildlife management area, or has amended the boundaries of such a park, reserve, sanctuary or area, or has abolished the same, the Minister may by order published in the Gazette amend the First, Second, Third or Fourth Schedule, as appropriate, to reflect such additions or changes.

[25] Laws of Botswana, Chapter 38:01.
[26] ibid, Chapter 27:01.
[27] Botswana employees union case (n 11) paragraph 103.
[28] Laws of Botswana, Chapter 38:01.

> (3) The Minister may, at any time, or from time to time, as necessary or desirable, by *order* published in the Gazette, amend any of the other Schedules to this Act.

There are numerous examples by which parliament has delegated to either the Minister or President the power to amend schedules of Acts by statutory instruments where this is necessary for the day to day administration and implementation of such Acts. But all are subject to the safeguard of the Statutory Instruments Act, namely that they must as soon as possible be laid before the National assembly which has 21 days within which to decide whether to exercise its residual power to annul the instrument. In this way parliament retains control over the whole legislative process.[29]

1.2 What can be delegated?

The general principle is that matters of principle are substantive provisions of the Act, and an Act can only be amended by Parliament. The line traditionally drawn is between principle and detail, between policy and the details or technicalities of its implementation.[30] The delegated power to make statutory instrument must therefore be limited to the power to make subsidiary legislation concerned with administrative and procedural matters.[31] Statutory instruments must not be ultra *vires* the Act, but should comply with section 5 of the Statutory Instruments Act by not being inconsistent with the parent Act or other Acts. The legislative power delegated is therefore limited to the purposes of the Act, and such purposes are gathered from the terms of the Act.

It is worth noting that, generally, parliament gives effect to a legislative purpose by enacting the main principles of law essential to the implementation of the purpose. Parliament may therefore

[29] Botswana employees union case (n 11) paragraph 94.
[30] Xanthaki (n 10) 403.
[31] It is worth noting that it is argued later in chapter 2 that this statement is misleading when ascertaining whether an instrument has legislative effect.

authorise others to provide for either the general or particular details necessary for the implementation of the purpose. Where this is necessary for the attainment of peace, order and good government, Parliament has the power to delegate to third parties law making powers which do not concern those matters of high policy. It must be noted that in Botswana parliament's power to make legislation is limited by section 86 of the Constitution to making laws for the peace, order and good government of Botswana. So, no matter what the policy goals are and what reasons may be given for delegating legislative powers, the ultimate question will always be whether action taken by parliament furthers the attainment of peace, order and good government.

This is because, as Justice Chaskalson P noted in a South African case[32], where parliament is established under a written constitution, the nature and extent of its power to delegate its legislative powers to the executive depends ultimately on the language of its constitution, construed in light of the country's history. Thus, what would have to be considered in relation to each Act of Parliament purporting to delegate law making power is whether or not it involved a shuffling off of responsibilities which, in the nature of the particular case and its special circumstances, and bearing in mind the specific role, responsibility and function that Parliament has, should not be entrusted to any other agency.[33]

The degree of delegation permissible therefore depends on each case upon the prevailing circumstances considered in the light of a number of factors. These includes among other things the wording of the constitution, the powers of the legislature, the nature and ambit of delegation, the subject matter, the identity of the delegate, and the degree of control exercisable by the

[32] *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) at page 903.
[33] Botswana employees union case (n 11) paragraph 107.

legislature following the delegation.[34] This resonates with Thornton's principles discussed earlier in the chapter[35]. In another case[36], Sachs J added further considerations. These included the extent to which the discretion of the delegate is structured and guided by the enabling Act, the public importance and constitutional significance of the matter, the period for which the amendment will operate before Parliament has a right to reject or annul it after open debate, and the extent to which rapid intervention is required which parliament cannot provide.[37] This approach, as courts have opined, is pragmatic. These principles, it must be said, have guided drafters in writing legislation as evidenced by several legislative drafting manuals in different jurisdictions and different articles and books written by scholars in the field.

It suffices to note that since independence, the position in Botswana has been that Acts of Parliament are enacted by parliament and statutory instruments are promulgated by members of the executive but only to the extent authorised by an Act of Parliament. This is a reflection of the general principle noted at the beginning of this part that substantive matters can only be amended by parliament. Consequently, there is no carte blanche, no room for a Henry VIII clause. There is also no room for the delegation of the power to either repeal Acts or to amend Acts of Parliament which require a special procedure for their enactment such as referral to *Ntlo ya Dikgosi* or to the people by referendum.[38] Parliament in Botswana cannot delegate such powers as that will constitute abdication of its own powers and be considered unconstitutional.

A drafter is henceforth required to ensure that the drafting instructions contain sufficient detail to determine the extent of the legislative power to be delegated. In determining the extent to which

[34] Botswana employees union case (n 11) paragraph 67.
[35] Chapter 1, first paragraph under the heading 'An overview of statutory instrument in Botswana'.
[36] Botswana employees union case (n 11) paragraph 68.
[37] ibid paragraph 68.
[38] ibid paragraph 93.

legislative power should be delegated, it is therefore imperative that the following matters are considered by the drafter, and these are guidelines provided in the drafting manual,

(a) identity of the delegate;

(b) whether power is for the general or a particular purpose; and

(c) consultation or obligation imposed on the delegate.

Apart from these, guidelines often used by other commonwealth jurisdictions and other drafting offices would also apply in the drafting office in Botswana. Guidelines from other drafting offices especially commonwealth jurisdictions have high persuasive authority in drafting issues in Botswana. Drafters in the country are always open to comparative drafting principles in commonwealth countries and will most likely apply such principles when drafting legislation. It therefore suffices to note that across the commonwealth, general principles have been developed to assist framers of legislation identify the boundary between primary and delegated legislation. It must be noted though that these are easier to state in the abstract than they are to apply. Among these principles are,

> (a) statutes should contain matters of higher level policy including significant changes to existing policy and matters that impact on individual rights and liberties e.g. powers of search and seizure;
>
> (b) procedural matters that go to the essence of a legislative scheme should be in the statute e.g. procedural matters for getting clearances and authorizations;
>
> (c) detail and technical matters required to implement the statute should be left to delegated legislation;
>
> (d) offences that impose significant criminal penalties should only be in a statute; and
>
> (e) delegated legislation is the appropriate mechanism if frequent changes are required, including responding to emergencies.[39]

[39] George Tanner, 'Confronting the Process of Statute Making' in Dr. Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis 2004) 45, 85.

The Westmister Cabinet[40] also provides a guide on when it is appropriate for a bill to delegate legislative powers and the following are some of the factors that must be considered when deciding whether the Bill should confer a power to make provision by secondary legislation,

> (a) the matter in question may need adjusting more often than parliament can be expected to legislate for by primary legislation,
>
> (b) there may be rules which will be better made after some experience of administering the new Act and which it is not essential to have as soon as it begins to operate,
>
> (c) the use of delegated powers in a particular area may have strong precedent and be uncontroversial, and
>
> (d) there may be transitional and technical matters which it would appropriate to deal with by delegated powers.

What stands to be considered though is whether these guidelines are sufficient to inform the drafter as to the form or type of instrument to be chosen when drafting provisions that confer powers to make subordinate legislation? The basis upon which drafters can determine with accuracy or correctly the form or type of instrument to be used can only be addressed in light of (1) what the term legislative effect means and (2) when does an instrument made under Act have legislative effect and this leads the discussion to the next chapter.

[40] Guide to making legislation, Cabinet Office July 2014.

Chapter 2

2.1 The meaning of legislative effect

The Merriam-Webster dictionary defines 'legislative' as having the power or performing the function of legislating. It further defines 'legislative' as belonging to the branch of government that is charged with such powers as making laws, levying and collecting taxes and making financial appropriations.[41] The Cambridge English Dictionary defines the word as relating to laws or the making of laws.[42] From these definitions one would ordinarily understand 'legislative effect' to mean that something has the effect of making or changing the law. Easy as it may sound, discerning which instruments have legislative effect is not that simple.

To elaborate further, an instrument is considered to have legislative effect if it determines or alters the content of the law applying to the public.[43] An instrument does not, however, have legislative effect if it merely interprets the statute and does not determine or alter the content of the law. That notwithstanding, the distinction often gets blurred when dealing with statutory instruments because these delegated powers are masked as statutory powers and are often exercised pursuant to enabling or empowering provision in an Act of Parliament. The distinction between a rule that merely explains the rights and obligations already created in the Act and one that creates or determines the contents of the rights and obligations already created in the Act is thus often blur.[44]

So over and above guidelines provided to drafters to determine what is substantive and what is procedural, which drafters mostly focus on when drafting enabling legislation, guidance ought to

[41] http://www.merriam-webster.com/dictionary/legislative accessed on 31/08/2016.
[42] http://dictionary.cambridge.org/dictionary/english/legislative accessed on 31/08/2016.
[43] Legislation Act 2012, www.legislation.govt.nz/act/public/2012 accessed on 16/08/2016.
[44] Kevin W. Saunders, 'Interpretive Rules with Legislative Effect - An Analysis and a Proposal for Public Participation', Duke Law Journal 1986, 346 at 350.

be provided to enable them to distinguish between procedural matters that have legislative effect and those that don't. More emphasis should be placed on clarifying what factors should be taken into account when determining whether an instrument will have legislative effect or not. This is needed to ensure clarity and consistency and more importantly to ensure that the National Assembly is not usurped of its oversight role and its ability to scrutinize subsidiary legislation where it is necessary.

When designing a legislative scheme or legislative plan, a drafter is often faced with the question what should the Act provide for and what should be delegated.[45] Should what is delegated take the form of a notice, order, regulations or rules. Choosing the form of delegated legislation goes to the root of what has legislative effect and what does not. Once the form of delegated legislation is chosen in the Act, there is little that can be done when now drafting delegated legislation. Once the Act says, for example, that the Minister may by *notice*…, no matter how substantive the issue may be, the instrument will take the form of a *notice.* And because of it being classified as a *notice*, it will immediately be taken not to have legislative effect and thus falling outside the scope of the Statutory Instruments Act.

An example can be noted from section 2 of the Immovable Property (Removal of Restrictions) Act[46]. The Act allows an owner of an immovable property to apply to the Registrar of Deeds to have a condition registered against their title affecting use or occupation of the property removed, suspended or altered. In terms of subsection 3 (a), the application would then be published by *notice* in the Gazette setting out particulars of the application and calling upon any person to lodge his or her objections with the Registrar within a stipulated time. Where there are

[45] Tanner (n 39) 85.
[46] Laws of Botswana, Chapter 32:08.

no objections, the Registrar is empowered to consider the application and make recommendation to the Minister whether the application should be refused or granted.

In terms of section 3 of the Immovable Property (Removal of Restrictions) Act, the Minister may then, on receipt of the recommendations of the Registrar, refuse the application or by *order* published in the Gazette alter, suspend or remove any condition or covenant from such title. Any person aggrieved by the decision of the Minister may appeal to the High Court. In the absence of an appeal or where an appeal has been abandoned, the Minister must transmit the copy of the *order* and title deed to the Registrar for endorsement. This is purely an administrative act in which an individual applies to have conditions in their title to property suspended, altered or removed.

A careful look at section 3 of the Immovable Property (Removal of Restrictions) Act shows that the order made by the Minister is an administrative order and has no legislative effect. It is therefore not a statutory instrument in the strict sense. However, because the Act's subject matter is removal of restrictions from title to property, the removal or change of conditions to title is to be done by an order and in this case an administrative order and not a notice. Notices are made generally for public information as is the case in the notice made in section 2 calling for objections. As noted earlier, if the wording in the enabling Act does not specifically provide for the power to be exercised by a statutory instrument then the order will be considered administrative and rightly so is the case in section 3 of the Immovable Property (Removal of Restrictions) Act.

It must be noted however that this principle has not been religiously applied in legislation in Botswana and there is a lot of inconsistencies in the language and wording used when conferring

powers to make subsidiary legislation. There are Acts of Parliament where powers to make subsidiary legislation have simply been conferred by saying "the Minister may make regulations…" without specifically saying that the "Minister may by statutory instrument make regulations to…".

Therefore, whilst other Acts are specific in conferring powers to make subsidiary legislation, other Acts are not. For example, section 92 of the Local Government Act provides, 'The Minister may make regulations prescribing anything required to be prescribed by this Act, and generally for carrying out the purpose and intent of this Act'. Similar examples can also be found in section 39 of the Botswana Tourism Organization Act, section 50 of the Statistics Act and several other Acts. This makes it difficult to ascertain whether the power being conferred is to be exercised by a statutory instrument or by other means. Because of lack of clarity, where the Act uses words order, regulations and declaration, these have generally been construed to imply statutory instruments. Making it specific that the power is to be exercised by statutory instrument would make it easier for one to determine whether an instrument should be a statutory instrument or an administrative instrument.

It must be remembered that in terms of section 2 of the Statutory Instrument Act, a statutory instrument must be made directly or indirectly under an Act and have legislative effect. So, two things must be satisfied for the instrument to qualify as a statutory instrument. First, it must be made pursuant to an Act of Parliament and second, it must have legislative effect. In the case of section 3 of the Immovable Property (Removal of Restrictions) Act, the decision is, yes, made pursuant to an Act of Parliament thus satisfying the first requirement. But the decision fails to meet the second requirement because it has no legislative effect. In the end, the drafting manual does not really help one distinguish between instruments that are purely administrative and

procedural from those that are administrative and procedural but having legislative effect because it places more emphasis on what is substantive and procedural without making any reference to legislative effect.

Furthermore and as noted earlier, parliament does not only delegate administrative and procedural matters. In the case of skeletal Acts, for example, substantive matters are provided for in delegated legislation. It is delegated legislation that provides for the operative content of the law and fine tunes a skeletal Act. The frequency of changes required to be made to that piece of legislation may also have been a factor in parliament delegating its legislative powers, as are other factors discussed in the thesis which may result in substantive matters being left for delegated legislation. For the legislative drafting manual in Botswana to categorically state that 'the delegated power to make statutory instrument must be limited to the power to make subsidiary legislation concerned with administrative and procedural matters' is clearly misleading.

In coming up with these sorts of manuals it is important that details be provided. Manuals should not be a mere statement of what is already contained in case law, books and journals. This is what a drafter uses on a daily basis. They are a drafter's tool of trade. Therefore, the drafting manual must be as detailed as possible, especially where such detail can be provided without necessarily dictating to the drafter what to do, if they are to ensure consistency. However, not all jurisdictions and even drafters are keen on the use of drafting manuals. If, on the other hand, consistency and uniformity can achieved through these manuals, then an effort must be made to ensure that detailed information is made available and easily accessible when it is particularly needed.

An issue whether an instrument has legislative effect is a practical one. It is an issue which one can only have to deal with when actually drafting a piece of legislation. It is not one that can be left for the courts to decide on or for the Minister to determine when issuing instructions.

It is worth remembering that courts only interpret the law on basis of the language used in the Act, and they use the language to ascertain the intention of parliament. Given the wording in section 2 of the Statutory Instruments Act it is very unlikely that the court will interpret a notice to have legislative effect, at least in the context of Botswana. Notices are normally published in newspapers circulating in the country except where the Act specifically provides for such notice to be published in Gazette and are not considered statutory instrument. Even where there are published in the Gazette, it is still for public information. The fact that a notice is chosen as a method for exercising a delegated power will indicate to the court that parliament did not intend to delegate a legislative power. Legislative effect is therefore an issue that is of particular interest to the drafter during the drafting process because this is what informs the type of instrument chosen when crafting the enabling or empowering provision in principal legislation.

Note however that in the New Zealand case[47], the Court of Appeal when determining the status of a notice published in the New Zealand Government Gazette which declared a fishery to be a controlled fishery and limiting the number of boat fishing licences for the fishery to the number existing at the time of the notice said,

> In the instant case the Gazette notice is ex facie general in its terms. It extends to all who propose to dredge for oysters in the area which it defines. It had effect against the whole world notwithstanding that it significantly protected the 23 boats previously fishing once the policy directive was made. In short, the notice was a general piece of delegated legislation.

[47] *Fowler & Roderique Ltd v the Attorney General* [1987] 2 NZLR 56 at 74 as cited by Berry (n 1) 7.

It is therefore possible that cases like this one could be found in Botswana, where the court makes a determination that a notice has legislative effect should such matters be brought before the courts. This will of course depend on the merits of each case.

It is quite surprising however that little has been done to provide details or the criterion on which drafters in Botswana can determine whether a rule or regulation has legislative effect. And this is an important factor in so far as section 2 of the Statutory Instruments Act is concerned. In the end, one may end up with a statute book that is full of regulations, which even though called regulations and thereby considered statutory instruments do not have legislative effect. An example is the order made under section 3 of the Immovable Property (Removal of Restrictions) Act discussed earlier. Whilst on the other hand notices containing substantive matters are made and the content of the law is lost in the midst of the confusion. As explained earlier, words such as 'regulations' and 'order' are generally construed to mean that an instrument is a statutory instrument.

The use of precedent also adds to the problem. This is where a drafter refers to other Acts to see what matters have been delegated without really focusing on the subject at hand and deciding on the basis of the circumstances and the policy before him or her which legislative powers could be delegated and what type of instruments could be used to exercise that delegated power.

Saunders has sought to clear the confusion by drawing a distinction between legislative rules and interpretative rules, and the distinction Saunders makes is that whilst both rules are a product of a delegated legislative power, substantive rules are raised pursuant to statutory authority and implement the statute, they create law by changing existing rights and obligations while

interpretative rules merely explain the rights and obligations already created, albeit in masked form, by the statute.[48]

It is therefore important that in determining whether a decision to make an instrument should be administrative in character that a drafter considers the effect of the decision being made in that instrument. Key questions such as will the instrument create or form new rules having general application or does it simply apply the law to a particular set of circumstances thus have to be taken into account. These should be considerations made over and above the identity of the delegate, the ambit of delegation and all those factors relating to substantive and procedural matters.

In enacting section 2 of the Statutory Instruments Act it is clear that parliament did not intend instruments that purely had administrative or procedural effect to be subject to parliamentary scrutiny or to be subject to the Statutory Instruments Act. Which is why it introduced a caveat in the Act and, the caveat is that the instrument must have legislative effect. But where does one draw the line?

2.2 When does an instrument made under an Act of Parliament have legislative effect?

The general distinction between legislation and the execution of legislation is that legislation determines the content of law as a rule of conduct or declaration as a power, right or duty whereas executive authority applies the law in particular cases. The rule of distinction therefore lies between the delegation of power to make the law, which necessarily involves discretion as to

[48] Saunders (n 44) 350.

what it shall be and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law.[49]

To give an example, the court citing Moyo's case in the Botswana employees union case[50], held that in construing section 39 (2) of the Constitution, as read with standing order 6, it is important to bear in mind that the right to vote resting in members present is not affected by a secret ballot. The standing order relates to the procedure alone and directs the mode in which the right to vote is to be exercised by electors. To expand on this example, suppose that the standing order did more than just provide for voting to be by secret ballot. If the standing order further provided that in order to vote, a member had to present a valid identity document and should have been present at the meeting preceding the voting day, then these requirements would have introduced restrictions and affected members' right to vote. These would have been conditions precedent to members exercising their right to vote. They affect the member's right to vote such that if the member does not present have a valid identity document they cannot exercise their right to vote, same thing applies if they missed the preceding meeting. Although these may be procedural matters, failure to comply has an impact on their right to vote. In other words, the conditions have a knock-on effect on the member's right to vote. This is what legislative effect is really about. It's not about the distinction whether something is administrative or substantive but the effect the act or thing has on legislation. It is what may be termed a domino or ripple effect.

If one were to further expand on the right to vote example, it will be noted that the knock-on effect or domino effect is not limited to one Act of Parliament only. In the case of national elections the right to vote is provided for in the Electoral Act, and the Act requires a person to

[49] Berry (n 1) 6.
[50] Botswana employees union case (n 11).

present a valid identity card. Identity cards are issued under the National Registration Act. Statutory instruments are made under the National Registration Act including administrative instruments such as notices. These will fine tune the Act and what may seem to be a wide allowance under the Act will become restricted when the Act is read with these instruments because the instruments will have laid down specific requirements that need to be satisfied for one issued with an identity card. As Lord Denning noted in one case, 'it seems to me that the statute and the rules together form a comprehensive code. They set out the procedure in such detail that there is nothing more needed to supplement it…'[51] This he said in the case of *Payne v. Lord Harris*[52], which concerned the Local Review Committee (LRC) Rules 1967.

If, for example, the Electoral Act provides that citizens and non-citizens lawfully resident in Botswana have the right to vote in national elections and that to vote a person must present to the electoral officer a valid identity document, another Act is added to the equation and that is the Immigration Act. The immigration Act will lay down requirements for issuance of residence permits. And may for example provide that to qualify for a residence permit a non-citizen must have been lawfully resident in the country for at least five years and may empower the Minister to make regulations for the better carrying out of the purposes of the Act.

The Minister then makes regulations stating the requirements and prescribing forms for application for the residence permit. One of the regulations is that a non-citizen must have been continuously resident and had uninterrupted stay in the country for five years. In calculating the continuous residence leading up to the five years, periods when the applicant travelled out of the country shall not count except where such travels were for business.

[51] As cited by Robert Baldwin and John Houghton, 'Circular arguments: the status and legitimacy of administrative rules' Public Law Journal 1986, 239 - 284.
[52] [981] 1 W.L.R. 754.

Further to that, the department of immigration then administratively devises means to authenticate whether indeed the person has been resident in the country and comes up with a check list of things or documents that should accompany the application form. Some of those things include a valid passport, work permit if the person has had business travels abroad during the five years, copy of a lease agreement or title to property, property meaning a residential place, as proof of residence and a note in the checklist specifically states that a hotel bill will not be considered as proof of residence.

The exclusion of a hotel bill as proof residence immediately introduces conditions to the residence within the five year period. The fine tuning of the Act by the regulations as read with the checklist means that to meet the five year period, the applicant must have, continuously with uninterrupted stay, been resident in the country and living in a leased or purchased house or property within that period. And that's the law. And because of that the person would not be issued with a residence permit, if for example they had lived at a hotel for an aggregate period of 12 months whilst they were still searching for a place to either lease or buy.

Applying the domino effect, what this means is that because of an administrative decision taken by the department of immigration to disallow hotel bills as proof residence, the applicant fails to meet the requirement in the regulations under the Immigration Act to have been continuously resident in the country for five years and consequently fails to meet the requirement under the Electoral Act to vote in national elections because he or she is unable to present a residence permit to the election officer.

If one were to look at the decision taken by the immigration department in isolation of the Electoral Act, the decision is administrative in the sense that the department simply wants to

ensure that the person has indeed resided in the country for the required five years and has come up with ways to authenticate that. The unfortunate thing is that the department whilst trying to come up with ways to authenticate the applicant's stay has introduced a condition that has legislative effect. And because the checklist is an administrative instrument and does not form part of the statute book, the applicant may have only become aware of the exclusion of hotel stays when they actually filled in the application for the residence permit.

All along the person may have been aware of the five years in the Act and the requirement for a continuous stay and restrictions on outside travels in the regulations, but may have never known that staying at a hotel would disqualify or reduce their five year period. And that might not be what the legislature had intended, in that the legislature may have never thought that the regulations or the department's administrative actions would narrow the five years to such an extent. Besides, it matters not really where someone lives whilst in the country. In actual fact hotels are the easiest way to settle into a country whilst finding a place to lease or buy when a person relocates to another country, so it would not make sense to have that kind of condition.

However, because the condition is introduced by an administrative instrument which is not laid before the National Assembly, the legislature is unable to scrutinize the instrument and exercise its residual power to annul it. And there is really no record in the laws to show that a person is required to stay at a leased or purchased property within the first five years if they intend to apply for a residence permit. So this also raises the issue of accessibility of legislation. In *Patchett* v. *Leathem,* Streatfield J. had this to say in relation to a Home Office circular,

> Whereas ordinary legislation, by passing through both Houses of Parliament or, at least, lying on the table of both Houses, is thus twice blessed, this type of so-called legislation is at least four times cursed. First, it has seen neither House of Parliament; secondly, it is unpublished and is inaccessible even to those whose valuable rights of property may be

> affected, thirdly it is a jumble of provisions, legislative, administrative, or directive in character, and sometimes difficult to disentangle one from the other; and fourthly it is expressed not in the precise language of an Act of Parliament or an Order in Council but in the more colloquial language of correspondence, which is not always susceptible of the ordinary canons of construction.[53]

The point being made is that what may appear to be purely administrative on the surface may actually have a knock-on effect on a substantive matter. Therefore what drafters ought to really focus on is the effect a decision has on legislation rather than focusing mainly on whether something is substantive or procedural. Given the nature and susceptibility of the language used in these administrative instruments, it is really important that precise and clear language and proper detailed guidance is given when crafting enabling and empowering provisions. The discretion of the delegate must therefore be clearly outlined, well structured and guided by the enabling legislation. Clear, precise and unambiguous language is thus imperative. Of course legislation cannot provide for every single situation but an effort must be made to minimize the domino effect in administrative instruments towards legislation. It is noted that this might be a simplified example but the intention really was to show how an administrative act or decision can impact on a substantive matter and thereby change the law.

Which is why when one looks and searches through the statute book, one realizes that not all instruments that are considered statutory instruments are actually statutory instruments within the within the meaning of section 2 of the Statutory Instruments. And there is a lot of information missing in the statute book. As noted earlier, the nomenclature used in delegation legislation or the labeling of statutory instruments as regulations, orders and proclamation also creates confusion as little effort is really put into ascertaining whether an instrument has legislative effect.

[53] (1949) 65 T.L.R. 69, 70.

Chapter 3 - Analysis

The issue of legislative effect is very complex and cannot be discussed without tapping into parliamentary scrutiny, effectiveness and accessibility of legislation. To understand the importance of this issue one needs to show the impact delegated legislation has on these three factors and how delegated legislation is regulated, which is what the preceding chapters attempted to do. This is why legislative effect in delegated legislation is a very important issue for the drafter because ignoring the issue or putting it on the side has far more reaching consequences than one would have ever thought.

As regards scrutiny, while recognizing the need for improved scrutiny of legislation, the donoughmore committee emphasized the necessity for delegated legislation in terms of legislative efficiency. The committee's report states that it is efficiency which is the principal justification for the delegation of law making powers.[54] Parliament, as currently constituted, struggles to give adequate scrutiny to primary legislation and this is particularly the case in Botswana where the Bills session is generally considered to be during the July/August session. The February/April session is mostly taken up by the budget speech and parliament's debate during that session centre around the budget with very little time left for the Bills. The same applies to the November/December session where parliament's time is taken up by the State of the Nation Address. So, the only time where parliament seems to have time devoted to Bills is the July session. And to burden parliament with the task of scrutinizing every detail of legislation would overload parliamentary timetable to extent that the system would break under the strain.[55]

[54] The Donoughmore Committee Report as cited by Hilaire Barnett, *Constitutional and Administrative Law,* (11th edn Routledge 2016) 332.
[55] Hilaire Barnett, *Constitutional and Administrative Law,* (11th edn Routledge 2016) 332.

Delegated legislation therefore enables the fine tuning of primary rules to take place, without encumbering parliament as a whole. It may be that government is clear as to the broad policy to be pursued under an Act, and as to the primary legal rules necessary to achieve a particular goal. There may however be less certainty as to the technical, detailed rules necessary. The delegation of law making power therefore enables such rules to be worked out, often in consultation with specialist interest groups outside parliament including government departments.[56]

This is why drafters ought to be diligent when crafting legislation especially empowering provisions in the enabling Act. It is within their expertise to look into the details and extent of what parliament delegates. And it is the drafter who, with due care and diligence, could assist parliament in the scrutiny of delegated legislative powers by ensuring during the drafting process that finer details are taken into account and adequate control by the legislature is provided for in legislation.

It must be noted that the justification for delegated legislation can hold good only if the powers granted are sufficiently clear and precise as to be adjudicated upon by the courts by way of judicial review and if parliamentary scrutiny accorded to it is adequate.[57] This is why statutory instruments must have legislative effect, so that only those instruments that impact on the substantive content of the law are subject to scrutiny. This is meant to safeguard scrutiny where it is needed but at the same time ensure that the parliamentary timetable is not taken up by instruments which have no legislative effect. It must be admitted though that finding the balance is difficult.

[56] Barnett (n 55) 332.
[57] ibid.

As regards what legislative powers parliament can delegate, there seems to be clarity that parliament will itself decide, given the circumstances, whether to delegate substantive and or procedural matters. In Westminster parliament, Hewart CJ argued that the increased use of delegated legislation amounted to an effective usurpation of the sovereign law making powers of parliament.[58] Such criticisms led to the appointment of committee of inquiry to consider powers exercised by Ministers by way of delegated legislation and to report on safeguards that were desirable or necessary to secure the constitutional principles of sovereignty of parliament and supremacy of the law.[59] In the Botswana employees union case however, and this reflects the courts' attitude towards delegated legislation in Botswana, the court opined that to introduce a statutory instrument as authorised by an Act of Parliament is neither in the ordinary course to usurp the function of parliament nor in delegating such a power within proper limits is parliament abdicating its constitutional mandate.[60]

Parliament is the ultimate legislative authority with the power to make laws for the republic, it must as such have the power in the appropriate circumstances to authorise other organs to exercise law making powers if it considers such delegation to be necessary for the proper discharge of its own functions. The law providing for such is also a law which it makes pursuant to its law making powers.[61] There is therefore nothing objectionable in the deliberate conferral of wide discretions, as long as the decision maker has the expertise necessary to ensure that the legislative scheme will work and the statute provides sufficient guidance about how the discretionary power is to be exercised. Legislation cannot provide for every situation.[62] In the end the delegation of legislative powers by parliament is a decision that can only be accepted as long

[58] As cited by Barnett (n 55) 332.
[59] Barnett (n 55) 332.
[60] Botswana employees union case (n 11) paragraph 88.
[61] ibid paragraph 90.
[62] Tanner (n 39) 93.

as the results are not so outrageous that the foundations of government under the rule of law are threatened.[63]

It must however be noted that the main issue and the root cause of the problems encountered in delegated legislation, especially those relating to legislative effect and parliamentary scrutiny, lie with the choice of instrument to be used in making such delegated legislation or in exercising that legislative power. As Xanthaki notes,

> the classification of delegated legislation according to nomenclature is generally in a state of muddle. For a long time and in many places names such as rules, regulations, orders, notices, by-laws, proclamations etc have been used inconsistently and indiscriminately. The confused inheritance from the past is not easily reformed but drafters need not add fuel to the fire.[64]

The Statutory Instruments Act particularly states the names *rules*, *regulations*, *byelaws* and includes these as statutory instruments. And because of the confused inheritance pointed out by Xanthaki, the use of those words in the Act, without any clarification, brings with it that confusion. As already noted, the line between substantive and procedural matters is not an easy one to draw. The more reason why there should be clarity as to what is legislative effect and when does an instrument have legislative effect.

What has been noted from the earlier chapter is that guidelines given to drafters focus on the distinction between substantive and procedural or administrative matters. In practice however, focus is really not on whether the issue is a substantive matter or a procedural one. It is really about what is practical in the circumstances to be delegated. Which is why the distinction between substantive and procedural matters can be quite misleading when dealing with whether an instrument has legislative effect or not. Once again as one looks closely at these guidelines,

[63] Tanner (n 39) 87.
[64] Xanthaki (n 10) 416.

one realizes parliament is faced with the issue of time. It would therefore make sense in some cases for parliament to delegate very wide legislative making powers to the executive. It will always therefore be a matter of judgment whether the delegation of law making powers goes too far.[65]

Several examples can be drawn from case law to demonstrate how the above principles have been applied Botswana. In the Botswana employees union case, section 49 of the Trade Disputes Act gave the Minister power to add, by a statutory instrument, services to a list of essential services in the schedule. Employees in the essential services were prohibited from participating in a labor strike, and a very stringent process was to be followed if they were to legally participate in a strike. Adding a service to this list immediately meant that the employees were not allowed to strike unless they complied with the stringent process set out in the Act. There was a strike in the public service which was orchestrated by trade unions.

During the course of the strike and having failed to reach an agreement with the trade unions, the Minister then used his powers under section 49 of the Act to amend the list, adding most of the services in the public service to the schedule. This was an attempt to end the strike. The trade unions then lodged a case against the Minister arguing that the amendment of the schedule was unconstitutional because parliament had abdicated its powers. The court held that the decision as to which services or categories of service should be classified as essential service was an important policy matter properly to be debated in parliament and to be subjected to public scrutiny.[66]

[65] Tanner (n 39) 87.
[66] Botswana employees union case (n 11) paragraph 117.

The court further laid down a criterion which could be used to determine whether the legislative power had been properly delegated. It stated that the criterion to be considered is whether parliament, in delegating the power to choose and designate services as essential services had laid down adequate policy guidelines and boundaries within which the Minister is to exercise his power to amend the schedule. In applying that test the court found that, on the face of it, no such guidelines have been laid out from which the Minister derives his powers.[67]

In an Australian case, the court had to determine whether the decision to make subsidiary legislation was of an administrative nature. This is a case where the Minister was to make determination whether an item of a customs tariff should apply to goods and the item applied as if goods were specified in the bylaw for purposes of that item. The argument raised before the court had been that a determination by the Minister that the item should apply to goods had the same effect as a bylaw. The court held that the decision was of an administrative character. The court found that the section did not have the effect of changing the relevant law. The court further declared that the distinction between legislative and administrative acts is essentially between first, the creation or formulation of new rules of law having general application and second the application of those rules to particular cases. In this case the Minister simply applied the law to a particular set of circumstances.[68]

This is not to be confused with issues relating to ultra *vires* which are mostly concerned with whether delegated legislation advances the legislative objectives and the policy of the empowering legislation. Factors considered when dealing issues of ultra *vires* are different from

[67] Botswana employees union case (n 11) paragraph 121.
[68] *Commonwealth v Gruneit* (1943) 67 CLR 58 at page 82 as cited by Berry (n 1).

issues considered when determining whether an instrument has legislative effect. Ultra *vires* issues relate to whether the delegate acted within the powers given in the Act.

Another point to note is that the Statutory Instruments Act provides a detailed procedure of how statutory instruments are numbered and how they will be then incorporated into the statute book. Section 7 (e) of the Revision of the Laws Act provides that the Laws of Botswana shall contain such subsidiary legislation as the Commissioner thinks fit to include therein. And in terms of section 49 of the Interpretation Act, subsidiary legislation has the same meaning as statutory instrument. So, it is important that the choice of instruments and the names given to such instruments be accurate for them to be part of the corpus of the laws of Botswana and thereby ensuring that the content of the law is not lost. Confusion relating to the nomenclature in delegated legislation has drastic consequences in that it not only affects parliamentary scrutiny but it also affects accessibility to delegated legislation. If an instrument containing substantive matters is left out because its name connotes that the instrument is not a statutory instrument, then the instrument will not be found in the statute book which means members of the public cannot access the instrument through the laws of Botswana.

Conclusion

It is worthy of note that the laying of statutory instruments before the National Assembly subjects subsidiary legislation to scrutiny by parliament. This is a measure that has been put in place to ensure that the executive accounts to the legislature and to ensure really that parliament retains control and has oversight over delegated legislation. Parliamentary scrutiny is therefore a major pillar in Botswana's constitutional system and democratic structure. However, not all instruments made under an Act will be subject to such scrutiny.

Clearly from the definition in section 2 only instruments that have legislative effect, with the exception of the rules of court, are required to be laid before the National Assembly. The Act does not define what legislative effect means nor does it provide a criterion upon which one can make a determination whether an instrument has legislative effect. It is often left to the drafter when coming up with the legislative plan to decide what should form part of the Act. This is because there are a range of matters for which delegated legislation may be made and these depend entirely on a particular statute. The drafter thus ultimately determines what belongs in principal legislation and what should be left for delegated legislation. In envisaging the operation of the legislative provisions, drafters are able to devise a legislative scheme of primary and secondary legislation and decide the matters that will be dealt with by appropriate levels of legislation.[69] Without any direction or clarity from the Act, determining what belongs in the Act and what should be delegated is in most cases a matter of judgment for the drafter.[70]

[69] Victoria E. Aitken, 'An exposition of legislative quality and its relevance for effective development' Rule of Law Development Advisor, PROLAW Graduate (2012) at page 27.
[70] Tanner (n 39) 86.

As a result drafters often make such determination on the basis of what they consider substantive matters *vis-a-vis* procedural matters, oblivious of the fact that some procedural matters have a more direct impact on substantive issues and thus may have legislative effect whilst others may be purely procedural and administrative and therefore not have legislative effect. This is especially the case where there are provisions in an Act whose entire effect depends upon the making of subordinate legislation, not merely in order to administer the provision but actually in order to give it substance. In another instance, there are Acts which provide a skeleton illustrating the general shape and structure of the intended law in relation to a matter but leaving all the detail to be provided by subordinate legislation.[71]

In these cases it very easy for the drafter to slip into the substantive *vs.* procedural distinction and to forget matters of supreme importance and thus without malice aforethought allow matters of substance to be slip into subsidiary legislation. In the worst case scenario, the drafter may have these provided for in instruments other than statutory instruments and thus not requiring scrutiny by the National Assembly. So, whilst words such as "the Minister may by *notice* establish" connote that the instrument is not a statutory instrument and the words "the Minster may by *regulations* establish" are considered to mean that the instrument is indeed a statutory instrument within the meaning section 2 and thus requiring publication in the gazette and laying before the National Assembly, choosing such words when drafting the empowering clauses or enabling provisions must done with due care to ensure that substantive matters do not end up in instruments that fall outside the definition in section 2 of the Statutory Instruments Act like in the case of notices. The same holds for other instruments such as orders and regulations.

[71] Greenberg (n 2) 10.

It must be emphasized that failure to exercise such due care when drafting empowering clauses puts a dent on scrutiny because only instruments that fall within the meaning provided in section 2 will be laid before the National Assembly. The choice of words such as order, regulation, notice has a massive effect in determining whether an instrument falls within section 2 or not and ultimately what gets laid before the National Assembly. Conferring on the Minister the power to do something by notice and not by an order or regulation immediately puts the instrument in the classification that is considered not to have legislative effect. The instrument will not be laid irrespective of its contents and whether or not it has legislative effect, thus enabling the executive to circumvent scrutiny, oversight and control by the legislature. If an instrument is legislative in character, the National assembly should be able to scrutinize it and disallow it. The words notice, order and proclamation therefore play important factor in what will be subject to parliamentary scrutiny and what won't. Issues relating to classification of instruments are, however, complex and these impacts heavily on scrutiny.[72]

As noted earlier, section 2 of the Statutory Instruments Act defines a statutory instrument as any proclamation, regulation, rule, rule of court, order, bye-law or other instrument made, directly or indirectly, under any enactment and having legislative effect. The Act requires at section 3 that every statutory instrument be published in the gazette. Further to that the Act requires at section 9 that every statutory instrument be laid before the National Assembly as soon as may be after it is made, after which the National Assembly may within 21 days pass a resolution to annul the instrument. The rules of court are, however, not required to be laid before National Assembly as provided for by section 9 (2) of the Act. It is recommended that the Act be amended to define what legislative effect means. This will bring more clarity and inform courts as to the intention

[72] Tanner (n 39) 88.

of parliament when dealing with delegated legislation and guide government as to which instruments have legislative effect. Berry, when making a case for defining the term legislative effect in principal legislation advised, and I agree with his advice, that

> It is important that executive government and its agencies should be able to identify all instruments that have a legislative effect. Although it would be impossible to remove the uncertainty entirely, the enactment of the proposed subsections would, I suggest, go a long way towards doing so. However, the proposed subsections should not define "instrument having legislative effect" exhaustively, because to do so would mean running the risk of not catching all the legislative instruments that were intended to be caught. Hopefully, this approach would provide the best of both worlds in so far as there would be reasonably specific, guidance as to what instruments had a legislative effect and were thus "subsidiary legislation", but at the same time the door would be left open for the inclusion of any legislative instruments that were intended to be caught.[73]

An example where this has been done can be found in section 39 of the Legislation Act 2012 in New Zealand where the legislature has defined legislative effect and provided for factors to be considered in determining whether a statutory instrument has legislative effect. The section provides,

> (1) An instrument has significant legislative effect if the instrument is to do both the following;
>
> (a) create, alter or remove rights or obligations; and
>
> (b) determine or alter the content of the law applying to the public or class of the public.
>
> …
>
> (4) An instrument does not have significant legislative effect if it explains or interprets rights or obligations in a non-binding way, as long as the instrument does not do anything that would bring it within subsection (1).
>
> (5) An instrument that is made in the exercise of a statutory power and imposes obligations in an individual case does not determine or alter the content of the law just because the statutory power applies generally or to a class of persons.

[73] Berry (n 1) 18.

Similar examples can also be found in sections 4 to 11 of the Legislative instruments Act 2003, in Australia. These, to some to degree, bring clarity and enhance certainty and consistency. In a similar manner, inserting a provision or provisions to that effect in the Statutory Instruments Act in Botswana can help address or minimize problems encountered when dealing with statutory instruments and legislative effect and in the end enhance parliamentary scrutiny.

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